In the Supreme Court of the United States.

OCTOBER TERM, 1907.

LIU HOP FONG, PLAINTIFF IN ERROR,
v.
THE UNITED STATES. } No. 181.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEBRASKA.

BRIEF FOR THE UNITED STATES.

STATEMENT.

This case is here on writ of error to the United States District Court for the District of Nebraska. The plaintiff in error, Liu Hop Fong, was arrested upon a warrant issued by United States Commissioner Anderson on a complaint sworn to before him by the United States attorney for the District of Nebraska, charging that said Liu Hop Fong was a Chinese laborer, who was in the country in violation of law. (R., 2.)

The record sets forth the complaint of the district attorney and a transcript of the proceedings

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before the commissioner who heard the case. This transcript shows that the defendant was brought before the commissioner on November 23, 1904, and the hearing was continued, at his request, from November 23 until December 20, 28, and 29, 1904.

On the last-mentioned day the case came on for hearing and the testimony of four witnesses was taken on behalf of the Government and of the defendant and one other witness on his behalf. The Chinaman defended on the ground that he had entered the country in pursuance of a certificate issued in accordance with the treaty and statutes, showing him to be a student and, therefore, a member of one of the excepted classes, and that he had come here for the purpose of studying English and the European sciences. None of the testimony appears to have been preserved or presented to the District Court (R., p. 15–d), but the commissioner made certain findings, which were to the following effect:

> And, from the evidence of the said witnesses, it appearing to me, the Commissioner, that the laws of the United States have been violated, as charged in the complaint, and that there is good cause shown to believe the defendant guilty of the alleged offense, it was ordered that defendant, Leo Hop, be deported from the United States to the Empire of China, his native country. (R., p. 14.)

On the day after the hearing the Commissioner made certain "additional and separate findings," the material portion of which reads as follows:

> I further find that during the time of his residence in said city he has at all times been a common laborer and has at no time pursued the study of the English language beyond the merest rudiments taught by his Sunday school teacher, and has at no time pursued the study of European sciences or any other study except as to the rudiments of the English language; and that the said Liu Hop Fong has at no time been a student within the meaning of the act of Congress approved May 5, 1892, and acts of Congress amendatory thereof, and that he is now unlawfully within the United States of America. (R., p. 15.)

The defendant took an appeal to the United States District Court, which, on April 13, 1905, affirmed the order of the Commissioner, the presiding judge filing a memorandum opinion, in which he said, *inter alia:*

> The only study that he has pursued in this country is the simple rudiments of the English language taught by his Sunday-school teacher. This does not make him a student of the English language and European sciences within the meaning of the act of Congress, and I am clearly of the opinion that the facts as found by the commissioner indicate that his coming to the

> United States to study the English language and European sciences as a student *was a mere device to gain entry into this country and not in good faith to pursue the studies of a student;* that his real intent and purpose in coming to the United States was for the purpose of laboring only. (R., p. 3.)

On April 22, 1905, the November, 1904, term of the court was adjourned, *sine die;* on May 8, 1905, a "petition for a new trial, both as to law and facts," was filed (R., 16), and on August 28 of the same year a motion for rehearing was submitted. On October 27 this application was heard and denied, Judge Munger filing a memorandum opinion, which reads as follows:

> This is an application for a rehearing. The original judgment was rendered at the November term, 1904. The application for rehearing was not made until after the term expired. The judgment became final with the termination of the term at which it was rendered.
>
> I have, however, examined the evidence and it is convincing that he was not a student within the meaning of the law. The law evidently meant and intended a student to be one who in coming to this country intended that to be his main object and purpose; and, although a student may perform manual labor while pursuing his studies for the purpose of maintaining and supporting himself and not lose his status

> as a student, yet it should appear that his main purpose was that of being a student.
>
> In this case, I think his main purpose and object was that of a laborer, and the studying which he did was a mere incident. The motion for a rehearing is denied and the order of deportation stands.

To review this judgment a writ of error was sued out from this court.

THE LAW.

The law applicable to the case at bar will be found in the treaty between the United States of America and the Empire of China, negotiated March 17, 1894 (28 Stat., 1210), and in the Acts of September 13, 1888 (25 Stat., 476), and of May 5, 1892 (27 Stat., 25).

Articles I and III of the Treaty read as follows:

> I. The high contracting parties agree that for a period of ten years, beginning with the date of the exchange of the ratifications of this convention, the coming, except under the conditions hereinafter specified, of Chinese laborers to the United States shall be absolutely prohibited.
>
> III. The provisions of this convention shall not affect the right at present enjoyed of Chinese subjects, being officials, teachers, students, merchants, or travelers for curiosity or pleasure, but not laborers, of coming to the United States and residing therein.

To entitle such Chinese subjects as are above described to admission into the United States, they may produce a certificate from their Governnent or the Government where they last resided viséed by the diplomatic or consular representative of the United States in the country or port whence they depart.

It is also agreed that Chinese laborers shall continue to enjoy the privilege of transit across the territory of the United States in the course of their journey to or from other countries, subject to such regulations by the Government of the United States as may be necessary to prevent said privilege of transit from being abused.

Section 13 of the act of 1888 provides:

That any Chinese person, or person of Chinese descent, found unlawfully in the United States, or its Territories, may be arrested upon a warrant issued upon a complaint, under oath, filed by any party on behalf of the United States, by any justice, judge, or commissioner of any United States court, returnable before any justice, judge, or commissioner of a United States court, or before any United States court, and when convicted, upon a hearing, and found and adjudged to be one not lawfully entitled to be or remain in the United States, such person shall be removed from the United States to the country whence he came.

Section 3 of the act of 1892 reads as follows:

That any Chinese person or person of Chinese descent arrested under the provi-

sions of this act or the acts hereby extended shall be adjudged to be unlawfully within the United States unless such person shall establish, by affirmative proof, to the satisfaction of such justice, judge, or commissioner, his lawful right to remain in the United States.

ARGUMENT.

The assignments of error, twenty-one in number, raise but two questions for the consideration of this court, which will be discussed in order.

I.

THE PROCEDURE FOLLOWED WAS REGULAR AND SATISFIED THE REQUIREMENTS OF THE LAW.

(*a*) ON BEHALF OF PLAINTIFF IN ERROR IT IS URGED THAT THE COMPLAINT IS INSUFFICIENT IN SUBSTANCE TO SUSTAIN THE ORDER OF DEPORTATION.

The record shows that the district attorney appeared before the United States commissioner and swore to a complaint charging that the defendant Leo Hop was a Chinese laborer unlawfully in the United States (R., 2). That this complaint had the effect of bringing the defendant before the commissioner and raising the issue of his right to be in the United States can hardly be denied. The contention of counsel for the plaintiff in error seems to be that the complaint should be tested by the technical rules of pleading in criminal cases. This question is no longer an open one in this

court. In *Fong Fue Ting* v. *United States* (149 U. S., 698, 728), the court said:

> When, in the form prescribed by law, the executive officer, acting in behalf of the United States, brings the Chinese laborer before the judge, in order that he may be heard, and the facts upon which depends his right to remain in the country be decided, a case is duly submitted to the judicial power; for here are all the elements of a civil case—a complainant, a defendant, and a judge—*actor, reus, et judex.* (3 Bl. Com., 25); *Osborn* v. *Bank of United States* (9 Wheat., 738, 819). *No formal complaint or pleadings are required, and the want of them does not affect the authority of the judge or the validity of the statute.*

The rule thus laid down was approved in *Chin Bak Kan* v. *United States* (186 U. S., 193, 199) and in *Ah How* v. *United States* (193 U. S., 65, 77), where Mr. Justice Holmes, speaking for the court, said:

> The complaints are objected to as insufficient, because in addition to alleging that the appellants are laborers not entitled to remain in the United States without certificates, it adds the words "having come unlawfully into the United States without certificates," thus implying, it is said, that an unlawful coming into the United States could be legalized by obtaining a certificate. It is enough to say that such objections have been answered by *Fong Yue Ting* v.

> *United States* (149 U. S., 698, 729), and *Chin Bak Kan* v. *United States* (186 U. S., 193, 199). In the former it was laid down that "no formal complaint or pleadings are are required." *That proposition is not affected by the later statutes.*

(*b*) THE THIRD ASSIGNMENT OF ERROR CHARGES THAT—

> THE TRIAL BEFORE THE DISTRICT COURT BEING *de novo*, AND THE EVIDENCE TAKEN BEFORE THE COMMISSIONER NOT BEING PRESERVED, THE COURT ERRED IN HEARING AND DECIDING THE CASE AGAINST THE DEFENDANT UPON THE FINDINGS OF THE COMMISSIONER ALONE, WITHOUT THE TAKING OF NEW AND ADDITIONAL EVIDENCE.

This objection to the procedure pursued by the district court in hearing the case on appeal comes too late, for the record (p. 15d) distinctly shows that neither side sought the introduction of additional evidence. The averment in the record on this point is as follows:

> The evidence taken before the Commissioner was not reduced to writing or preserved, or in any manner presented to the district court. *And no other or further evidence than above recited was offered by either party.* Upon consideration whereof, *after argument by counsel for both parties*, the court or judge on the same day filed an opinion and ordered the defendant deported, to all of which the defendant excepted.

This shows clearly that counsel for the Chinaman made no offer of additional evidence at the hearing before the District Court, but that he did orally argue the points involved. In view of this it is difficult to see how the judge could have done otherwise than act upon the findings of the Commissioner.

Manifestly, the presumption was that the findings of the Commissioner were warranted by the evidence submitted to him, and if the plaintiff in error wished to have that finding reversed it was incumbent on him to show affirmatively that the evidence was insufficient to justify the order of deportation. This he has not done.

"He has made no objection to the finding of facts before the Commissioner and thus has impliedly assented to a hearing before the judge on an agreed statement of facts." In re Chin Ark Wing, 115 Fed., 412, 413.

But, aside from this, it is doubtful whether the action of a court in determining a Chinese case on appeal, solely upon the findings of the Commissioner, and its refusal to grant a trial *de novo*, would afford ground for a review of that action. It is true that in some instances courts have granted trials *de novo*, but this practice is by no means required by statute.

In the *Fong Yue Ting* case, supra, at pp. 713 and 714, Justice Gray said:

> The power to exclude aliens and the power to expel them rest upon one founda-

> tion, are derived from one source, are sup ported by the same reasons, and are in truth but parts of one and the same power.
>
> The power of Congress, therefore, to expel, like the power to exclude aliens, or any specified class of aliens, from the country, may be exercised entirely through executive officers; or Congress may call in the aid of the judiciary to ascertain any contested facts on which an alien's right to be in the country has been made by Congress to depend.

In the case of *Chin Yow* v. *United States* (208 U. S., 8), decided at this term of the court, it was held that the statutes merely require a fair, though summary, hearing. While that case related to an exclusion proceeding, the policy of the law seems to be the same in regard to a deportation proceeding and, as was stated by the Chief Justice in the Chin Bak Kan case, supra, at page 201:

> Except in cases under that section where the question of jurisdiction alone is certified we have power to dispose of the entire case, but as the jurisdiction of the Commissioner is sustained we are of opinion that we can not properly reexamine the facts already determined by two judgments below. That is the general rule, and there is nothing to take this case out of its operation, and, on the contrary, the conclusion is, *a fortiori*, justified. The same reasoning in respect to the authority to exclude applies to the authority to expel, and the policy of the

> legislation in respect to exclusion and expulsion is opposed to numerous appeals. And we are not disposed to hold that where a Chinese laborer has evaded the executive jurisdiction at the frontier and got into the country, he is therefore entitled to demand repeated rehearings on the facts.

In the case at bar it is very clear that the plaintiff in error had ample opportunity to present any evidence he might have had bearing on his right to remain in the United States. As has been stated, the record shows that the hearing was adjourned for a month, at his request, and it is not alleged that the commissioner in any way abused the discretion vested in him. Appeal was taken to the District Court, which affirmed the finding of the commissioner. On an application for rehearing, although filed after the court had adjourned for the term, the district judge again reviewed the merits of the case, taking under consideration a number of affidavits filed on behalf of the plaintiff in error, and for a second time expressed the opinion that the Chinaman was not entitled to remain in the United States.

The court was also justified in affirming the decision solely upon the commissioner's report of the evidence. In the Ah How case, supra, at page 78, this court said:

> We have assumed, for the purpose of decision, what does not appear from the record, that the judge who tried the case on appeal

tried it solely on the Commissioner's report of evidence and heard no witnesses.

The procedure to be followed would, under the statute, seem to be a matter entirely within the sound discretion of the court.

II.

THE DEFENDANT IS NOT A STUDENT WITHIN THE MEANING OF THE TREATY, AND THE CHINESE EXCLUSION LAWS ENACTED IN CONFORMITY THEREWITH.

The ninth and fourteenth assignments of error read as follows:

> 9. The court erred in ordering the defendant deported, because the defendant was a student and belonged to the student or teacher class (and not laboring class) in China and was as such entitled to come and remain here.
>
> 14. The court erred in finding and holding that the character of defendant's schooling here was not a compliance with the treaty and laws, because the course of learning to be pursued and the time to be used for that purpose are by them left to his own discretion.

The treaty with China of 1894 (28 Stat., 1210, 1211), expressly designates the classes of Chinese persons who shall be permitted to enter the United States and reside therein. Obviously those Chinese persons not included in any of these classes are to be regarded as *not* entitled to admis-

sion, or, having through any means obtained admission, to thereafter reside in the United States. This is very aptly phrased in the case of *Lee Ah Yin* v. *United States* (116 Fed., 614, 616), the Circuit Court of Appeals for the Ninth Circuit saying:

> * * * the words "Chinese laborers" as used in the treaty were intended to designate all immigration to the United States from China other than that of the privileged classes, who were by the terms of the treaty permitted to come * * *.

Article III of the treaty provides:

> The provisions of this convention shall not affect the right at present enjoyed of Chinese subjects, being officials, teachers, students, merchants or travelers for curiosity or pleasure, but not laborers, of coming to the United States and residing therein. To entitle such Chinese subjects as are above described to admission into the United States, they may produce a certificate from their government or the government where they last resided, viséd by the diplomatic or consular representative of the United States in the country or port whence they depart.

Congress, in section 6 of the act of May 6, 1882, as amended by the act of July 5, 1884 (23 Stat., 115), has declared the effect to be given the certificates mentioned in the treaty:

* * * * *

> Such certificate viséed as aforesaid shall be *prima facie* evidence of the facts set forth

> therein, and shall be produced to the Chinese inspector in charge of the port in the district in the United States at which the person named therein shall arrive, and afterwards produced to the proper authorities of the United States whenever lawfully demanded, and shall be the sole evidence permissible on the part of the person producing the same to establish a right of entry into the United States; *but said certificate may be controverted and the facts therein stated disproved by the United States authorities.*

Counsel for plaintiff in error urges that in spite of the clear and unambiguous language of the statute the certificate under which the Chinaman entered the country is made the sole test of his right to remain here. He uses this language (p. 19 of his brief):

> In fact the issuance to plaintiff in error of his student's certificate, and his subsequent admission thereunder into this country, by the officers of the government, operated as an adjudication of the bona fides and lawfulness of his coming. That decision, unappealed from, is *res adjudicata* and entitles the defendant to remain here, at least until such determination is overcome by strong competent evidence. And his changing his occupation from student to laborer, or anything else, after coming here, would not constitute such overcoming evidence or defeat his right to remain here. His right to remain depends altogether on his

> "coming," whether that was lawful, whether bona fide or mala fide, whether he was in fact a student and one of the student or teacher class in China, or a laborer there intending to be a laborer here.

He cites a number of cases in support of this proposition, but an examination of them will disclose that in each instance the Chinaman was found to be entitled to remain here either because he was a bona fide merchant during the period of registration, and therefore not required to obtain a laborer's certificate, or by reason of adversity after the pursuit of mercantile business for a long period of time after entering the country as a merchant, he had been compelled to do laboring work to support himself. None of these cases ruled that the certificate under which members of the exempt classes enter the country, is the sole test of the right to remain here. On the contrary, the Chinamen were required to show that they pursued in good faith the exempted avocation mentioned in their certificate, immediately following their entrance into the country, and that they continued to pursue such avocation until compelled for some reason to become laborers.

The theory of counsel, if adopted, would upset the whole purpose of the Chinese exclusion laws to prevent competition between American and Chinese labor. If a Chinaman having obtained admission to this country under a certifi-

cate alleging him to be a member of the excepted classes, is privileged, immediately following his admission, to enter upon the occupation of a laborer and no question can be raised as to his good faith in securing the certificate, then the provisions in the treaty permitting members of the excepted classes to come to and reside in the United States, and requiring them to bring certificates identifying them, are rendered nugatory and of no effect. It would require a strained construction to make these provisions operate to confer special privileges upon members of the excepted classes so far as their right to come to the United States and labor is concerned.

The extent to which Chinamen residing here may claim protection under these certificates has been the subject of judicial determination. In the case of *United States* v. *Yong Yew* (83 Fed., 832, 838) it was said:

> Now construing all the legislation on this subject in the light of our internal policy as already stated, I am disposed to hold that the law, properly and effectually construed, contemplates that a merchant of China may enter this country only for the purpose of prosecuting his business as a merchant here. "He may not under pretence of being a merchant secure entrance as such intending immediately to become and continue a laborer." * * * Conceding full faith and credit to his certificate of identity, his con-

> duct, in proceeding immediately to work as a laborer, and continuing so to do up to the time of his arrest, belies his pretensions as a merchant.

And again in the case of *United States* v. *Ng Park Tan* (86 Fed., 605):

> * * * This certificate is only prima facie evidence of the right of the defendant to remain in the United States, and its effect as such overcome by the other evidence in the case, showing that defendant immediately after landing in this country, engaged in manual labor.

To overcome the evidence of the Government showing him to have been a laborer at the time of his arrest, and for some time prior thereto, the Chinaman, in the case at bar, put in evidence his student's certificate and the testimony of his teacher covering the scope and extent of his studies. From all the evidence the Commissioner found that the Chinaman was not and had not been a student within the meaning of the treaty and Chinese exclusion laws, but was a laborer, and ordered him deported.

The treaty and the statutes manifestly contemplate the exclusion of all laborers. If persons whose occupation is that of laborers may by attending school bring themselves within the student class, Congress has enacted inconsistent legislation in excluding all laborers, on the one hand,

and allowing the admission of such laborers as may attend a school, on the other. The term "student" is to designate the status or occupation of a person, and does not relate to the mere accident of whether or not such person is incidentally taking a course of study.

The word "student" has a common meaning, and it must be presumed that the high contracting parties to the treaty had that meaning in mind when they agreed upon its use to cover a class of persons who should be permitted unrestricted entry into the United States. The word does not appear ever to have been the subject of judicial interpretation, so we must look to other sources for its definition. The following definitions taken from the Standard Dictionary, and the Century Dictionary and Encyclopædia, unquestionably represent the universally accepted meaning of the term:

The Standard Dictionary:

> 1. A person engaged in a course of study; especially one who attends and studies at a higher school, college, or seminary; an advanced scholar; as, a law or medical student.
>
> 2. One devoted to study; one who closely examines or investigates.

The Century Dictionary and Encyclopædia:

> A person who is engaged in a course of study either general or special; one who studies, especially with a view to education

> of a higher kind; an advanced scholar or pupil; as an academic or college student; student of theology, law, medicine, or art.

With these definitions in mind, it becomes a simple matter to determine whether the Chinaman in this case is a student, and upon this point we need look no further than his own claims regarding the character of the study he has pursued since his admission to the country. In his affidavit accompanying his application for a new trial it is stated (R. 21): that he came to the United States in July, 1899, and had resided therein up to the time of his arrest, which by the complaint is shown to have been made on November 23, 1904, a period of over five years, and yet that at the end of that time he was only pursuing a rudimentary course in English. It hardly seems possible that if he had in good faith been a student he would not have progressed beyond that stage in his studies. The affidavit further says:

> * * * He went to the Presbyterian Sunday School held in the Presbyterian Church, in Omaha, at the corner of Seventeenth and Dodge streets, opposite the Post-Office Building, and became a regular attendant of that Sunday School, and continued a member of that class for several years and all the while it was in existence; that he at the same time pursued his studies diligently through the week and attended the private

school, one of his sunday school teachers; Mrs. Anna M. Sykes, kindly offered to teach him the English language; and affiant states that he was in the habit of going to her home daily for his lessons, and that Mrs. Sykes would give him his lessons, etc.

An affidavit of Mrs. Sykes, his teacher, was also submitted, and her statement is as follows (R., p. 24):

* * * Affiant states that she has resided in Omaha about eleven years and has been a member of the Presbyterian Church at Seventeenth and Dodge streets in Omaha, Nebr., and has been a teacher in the Sunday school of that church during nearly all that time; that there has been in the Sunday school a class of Chinese boys composed of Chinese who have recently come here from China; the object of the Chinese class was to make them better citizens and especially to teach them the English language as well as Christian principles; that the class met on every Sunday of the year, except perhaps a few Sundays in midsummer, and was conducted as an exercise in the study of the English language, the class using a prepared book for that purpose with the English and Chinese set opposite on the same page; affiant was a teacher of said class when the defendant, Leo Hop Fong, came to Omaha, and she became acquainted with him in the class very soon after his coming, and ever after that Leo Hop Fong was a

> regular attendant; that in addition to his attending the Sunday school class he also came to her residence during the week time and would come there day after day during the year as often as it was convenient for affiant to give him a lesson * * * .

Thus it will be seen that the study pursued by the defendant since his admission to this country was of the most rudimentary character, such as every Chinese laborer coming to the United States for the first time, would naturally pursue. To uphold the contention that such study constituted the defendant a student would result in defeating the very purpose of the Chinese exclusion laws, and in making their enforcement a practical impossibility. Under such an interpretation of the word student, a Chinese laborer desiring to obtain admission to and residence in this country need only present a certificate setting forth that he is a student, *i. e.*, that he has been attending a school, and then, upon gaining admission to the country, to connect himself with some Sunday school class, as in the case at bar, or through some similar means pursue elementary study. Such a proposition is out of harmony with the commonly accepted meaning of the word student, and is opposed to the spirit and letter of the treaty and exclusion laws.

III.

Conclusion.

The remaining assignments of error either contain in different form the errors here noticed or relate to matters which, even though established, would not support a decree of reversal.

The finding in this case is supported by two judgments below, and, as previously pointed out, the testimony upon which the Commissioner and District Court grounded their decisions has not been preserved. No showing of abuse of discretion is made, and this court will not, therefore, disturb those judgments. *Chin Bak Kan* v. *United States* (186 U. S., 193, 201).

The defendant has clearly failed to sustain the burden the statute imposes upon him of establishing "by affirmative proof, to the satisfaction of such justice, judge, or Commissioner, his lawful right to remain in the United States," as a student.

The judgments below should be affirmed.

ALFORD W. COOLEY,
Assistant Attorney-General.

MARCH, 1908.

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